ANG SING HOCK

v.

PRIME CREDIT LEASING SDN. BHD.

COURT OF APPEAL, KUALA LUMPUR
TAN SRI DATO' LAMIN MOHD. YUNUS PCA
DATO' ABU MANSOR ALI JCA
DATO' AHMAD FAIRUZ SHEIKH ABDUL HALIM JCA
[CIVIL APPEAL NO: W-04-41-95]
2 JULY 1996

CIVIL PROCEDURE: *Appeal - Appeal to Court of Appeal - Appeal Record - Adducing of fresh documents - Principles - Documents filed in hearing before Sessions Court but not filed in Appeal Record for appeal to High Court - Whether could be filed in Appeal Record for appeal to Court of Appeal - Whether receivable in evidence therein - Whether contravened O. 18 r. 4(c) Rules of the Court of Appeal 1994.*

CIVIL PROCEDURE: *Appeal - Appeal to Court of Appeal - Appeal Record - Draft index of documents to be included in Appeal Record - Draft not sent to opposing party - Whether contravened O. 18 r. 6 Rules of the Court of Appeal 1994 - Whether fatal.*

In the Sessions Court, the applicant (Ang) was the defendant in the application for summary judgment by the respondent (Prime Credit). While opposing the application, Ang had put forth certain documents for the Court's consideration including a certain application and an affidavit (Exh. "A"). The summary application was dismissed by the learned Sessions Judge, whereupon Prime Credit appealed to the High Court. The facts showed that the Appeal Record as filed by Prime Credit did not contain Exh. "A", but this "slip-up", somehow, was overlooked by Ang. The result was that before the High Court Ang did not make an issue of the exhibit's absence. An attempt was made by Ang to make reference to Exh. "A" but was objected to by Prime Credit. Be that as it may, Prime Credits's appeal was allowed by the High Court wherefore Ang appealed to the Court of Appeal. Apparently, in his said appeal to the Court of Appeal, Ang intended to also rely on Exh. "A", and so, having filed Exh. "A" in his Record of Appeal, applied by way of motion for an order that the exhibit be received in evidence. Before the learned Judges, the issue that arose was whether the motion ought to be allowed, bearing in mind the facts and the circumstances, and the relevant provisions of the Rules of the Court of Appeal, 1994.

Held:

Per Abu Mansor Ali JCA (delivering the judgment of the Court):

[1] Exhibit "A" as filed in the Appeal Record for the purpose of Ang's appeal to the Court of Appeal were not in accordance with O. 18 r. 4(c) Rules of the Court of Appeal 1994. What has been included in Exh. "A" are copies of documents in the Sessions Court not sought to be included by Ang in the Record of Appeal for the purpose of the appeal to the High Court.

[2] In filing Exh. "A" presently, Ang failed to resort to O. 18 r. 6 which set out the procedure before such filing can take place. The failure of Ang in this respect has robbed the respondent of the chance to serve his objection within the fourty-eight hours prescribed. This in itself disentitled Ang to have the order sought for.

[3] It is trite law that this type of evidence can only be admitted if that evidence was not avalaible to applicant after exercising due diligence. This Exh. "A" was available but was not included in the Appeal Record of the High Court due to neglect and oversight.In the circumstances, this application must fail, and consequently, Prime Credit must succeed in its application to have Exh. "A" excluded from the Record of Appeal.

[Appeal dismissed. Exhibit "A" excluded from Record of Appeal]

***[Bahasa Malaysia** Translation of Headnotes]*

***PROSEDUR SIVIL:** Rayuan - Rayuan kepada Mahkamah Rayuan - Rekod Rayuan - Pengemukaan keterangan baru - Prinsip - Dokumen difailkan ketika perbicaraan di Mahkamah Sesyen tetapi tidak difailkan dalam Rekod Rayuan bagi rayuan ke Mahkamah Tinggi - Samada boleh dimasukkan dalam Rekod Rayuan bagi rayuan ke Mahkamah Rayuan - Samada boleh diterima sebagai keterangan di dalam Mahkamah Rayuan - Samada melanggari A.18 k.4(c) Kaedah-kaedah Mahkamah Rayuan 1994.*

***PROSEDUR SIVIL:** Rayuan - Rayuan kepada Mahkamah Rayuan - Rekod Rayuan - Deraf indeks dokumen-dokumen yang hendak dimasukkan ke dalam Rekod Rayuan tidak dihantar kepada pihak yang membantah - Samada melanggari A. 18 k. 6 Kaedah-kaedah Mahkamah Rayuan 1994 - Samada memudaratkan.*

Dalam Mahkamah Sesyen, pemohon (Ang) adalah merupakan defendan dalam permohonan untuk mendapatkan penghakiman terus oleh responden (Prime Credit). Sementara membantah permohonan tersebut, Ang telah mengemukakan beberapa dokumen untuk pertimbangan Mahkamah termasuk sesuatu permohonan dan satu afidavit (Eks. "A"). Permohonan terus itu telah ditolak

oleh Hakim Mahkamah Sesyen yang bijaksana, lalu Prime Credit telah merayu kepada Mahkamah Tinggi. Fakta-fakta menunjukkan bahawa Rekod Rayuan sepertimana yang difailkan oleh Prime Credit tidak mengandungi Eks. "A", tetapi "kesilapan ini" bagaimanapun, telah tidak dilihat oleh Ang. Hasilnya adalah di hadapan Mahkamah Tinggi, Ang tidak menjadikan isu akan ketiadaan ekshibit tersebut. Satu percubaan telah dibuat oleh Ang untuk membuat rujukan kepada Eks. "A" tetapi telah dibantah oleh Prime Credit. Sebagaimana keadaanya, rayuan Prime Credit telah dibenarkan oleh Mahkamah Tinggi, yang menyebabkan Ang merayu kepada Mahkamah Rayuan. Dalam rayuannya kepada Mahkamah Rayuan, Ang telah berniat untuk bergantung pada Eks. "A", dan dengan itu, setelah memfailkan Eks. "A" dalam Rekod Rayuannya, telah memohon melalui usul untuk mendapatkan satu perintah supaya ekshibit itu diterima sebagai keterangan oleh Mahkamah Rayuan. Dihadapan Hakim-Hakim yang bijaksana, isu yang berbangkit adalah samada usul tersebut harus dibenarkan, mengambilkira fakta dan keadaan yang wujud, serta peruntukan-peruntukan relevan Kaedah-kaedah Mahkamah Rayuan, 1994.

Diputuskan:

Oleh Abu Mansor Ali HMR (menyampaikan Penghakiman Mahkamah):

[1] Ekshibit "A" sepertimana yang telah difailkan dalam Rekod Rayuan bagi tujuan rayuan Ang kepada Mahkamah Rayuan tidak mengikuti A. 18 k. 4(c) Kaedah-kaedah Mahkamah Rayuan 1994. Apa yang telah dimasukkan dalam Eks. "A" adalah salinan-salinan dokumen dalam Mahkamah Sesyen yang tidak dimasukkan oleh Ang ke dalam Rekod Rayuan bagi tujuan rayuan kepada Mahkamah Tinggi.

[2] Dalam memfailkan Eks. "A" di sini, Ang telah gagal untuk merujuk kepada A. 18 k. 6 yang membentangkan prosedur sebelum pemfailan yang sedemikian boleh dilakukan. Kegagalan Ang sehubungan dengan perkara ini telah melucut responden dari peluang untuk menyampaikan bantahannya dalam tempoh empat puluh lapan jam yang ditetapkan. Ini dengan sendirinya tidak memberi hak kepada Ang untuk mendapat perintah yang dipohonnya.

[3] Ianya merupakan undang-undang trite bahawa keterangan jenis ini hanya boleh diterima masuk sekiranya keterangan itu tidak di dapati oleh pemohon selepas melaksanakan usaha-usaha yang sepatutnya. Eks. "A" ini telah pun tersedia ada, tetapi tidak dimasukkan dalam Rekod Rayuan Mahkamah Tinggi disebabkan oleh kecuaian dan kesilapan. Dalam halkeadaan sedemikian, permohonan ini haruslah gagal, dan akibatnya Prime Credit haruslah berjaya dalam permohonannya untuk mengeluarkan Eks. "A" daripada Rekod Rayuan.

[Rayuan ditolak. Ekshibit "A" dikeluarkan daripada Rekod Rayuan]

Legislation referred to:
Rules of the Court Appeal, O. 18 rr. 4(c), 6

For the appellant - Mazridzuan Mohamad; M/s. Jargit & Partners
For the respondent - Paul Kwong Kum Wah; M/s. Azman Davidson & Co.

JUDGMENT

Abu Mansor Ali JCA:

This is an appeal against our decision dismissing the motion of the appellant/applicant Encl. (27B) for an order that Exh. 'A' (applicant's application and affidavit filed in the Sessions Court Saman 52-6298-1992) (Sessions Court case) be received as evidence by the Court of Appeal. After hearing arguments on 28 May 1996, we unanimously dismissed this application. After having made the order in Encl. (27B), as a consequence, we granted the respondent's application in Encl. (27A), granting the respondent's application which had the effect of excluding Exh. 'A' from the Record of Appeal.

As can be gathered the facts of this case are as follows. The appellant/applicant in the present appeal was a defendant in the application for a summary judgment before the Sessions Court case. The learned Sessions Court Judge held there were triable issues and dismissed the plaintiff's application. The plaintiff appealed to the High Court. It is an undisputed fact that the Appeal Record prepared by the plaintiff/appellant in the High Court did not contain the Exh. 'A'. At the High Court this present applicant did not make an issue of the absence of Exh. 'A' in the Appeal Record before the learned Judge. The applicant conceded they overlooked. The learned Judge of the High Court allowed the appeal and the applicant/defendant applied to have Exh. 'A' which was objected to in the High Court to be included in the appeal before the Court of Appeal. After hearing arguments, we dismissed applicant's application as stated above.

The central issue before this Court was whether we should allow this Exh. 'A' evidence to be included in the Appeal Record for the purpose of an appeal to the Court of Appeal when that evidence though available was inadvertently not included in the Appeal Record of the High Court. Attempt was made by the defendant to refer to them but was objected to by the appellant in the High Court since the exhibit was not before it.

In dismissing the applicant's application, we upheld the respondent's objection after finding that the objections were valid ones.

Firstly when the Appeal Record for the purpose of appeal to the Court of Appeal were filed, they included Exh. 'A'. They were not in accordance with O. 18 r. 4(c) Kaedah-Kaedah Mahkamah Rayuan which provides:

18(1) The appellant shall prepare a memorandum of appeal setting forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, and specifying the points of law or fact which are alleged to have been wrongly decided; such grounds to be numbered consecutively.

(2) -

(3) -

(4) The appellant shall attach to such memorandum copies of the proceedings in the High Court, including -

(a) -

(b) -

(c) copies of all affidavits read and of all documents put in evidence in the High Court so far as they are material for the purposes of the appeal, and subject to r. 101 if such documents are not in the national language, copies of certified translations thereof;

(d) -

(e) -

As stated what has been included in Exh. 'A' are copies of documents in the Sessions Court not sought to be included by the applicant in the Record of Appeal for the purpose of the appeal to the High Court but only referred by the respondent/defendant in the High Court appeal under circumstances of strong protest by the appellant that the Sessions Court's records in Exh. 'A' was not part of the High Court record that they could be referred to.

Secondly and most relevant the applicant, in the filing of Exh. 'A' presently, failed to resort to O. 18 r. 6 which set out the procedure before such filing can take place. Order 18 r. 6 provides:

(6) A draft index of the documents to be included in the record of appeal shall be sent by the appellant's solicitors to the solicitors for the respondent who or (if more than one) any of whom may within forty-eight hours object to the inclusion or exclusion of any document. In the event of the parties being unable to agree, the matter shall be referred to the Registrar of the High Court who may require the parties to attend before a Judge of the said Court. The Registrar of the High Court as well as the parties shall endeavour to exclude from the record all documents (more particularly such as are merely formal) that are not relevant to the subject matter of the appeal taking special care to avoid the duplication of documents and unnecessary repetition of headings and other merely formal parts of documents. Where in the course of preparation of the record one party objects to the inclusion of a document on the ground that it is unnecessary or irrelevant and the other party nevertheless insists on its being included, the record, as finally printed or typed shall, with a view to the subsequent adjustment of the

costs of and incidental to such documents, indicate, in the index of papers, or otherwise, the fact that, and the party by whom, the inclusion of the document was objected to.

The failure of this applicant to resort to this procedure has robbed the respondent of the chance to serve his objections within the forty-eight hours prescribed. This in itself, in our view, disentitled the applicant to have the order sought for.

Lastly, it has many times been decided that it is trite law that this type of evidence can only be admitted if that evidence was not available to applicant after exercising due diligence but this Exh. 'A' was there available and was not included in the Appeal Records of the High Court due to neglect and oversight.

Having heard arguments and considered this application fully, we were of the view we should dismiss this application with cost to the respondent. As a consequence of our decision in Encl. 27B, the respondent succeeds in his application in Encl. (27A) and we had to allow the respondent's application in Encl. (27A) with costs. The appellant appeals.

Reported by W.A. Sharif